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IN THE

Supreme Court of the United States

October Term, 1967

No. ~~1359~~ 132

JOHN RODERICK,
as Trustee of Mrak Coal Company,
WILLIAM MRAK and ELEANOR MRAK,
the Real Parties in Interest,
Petitioners,

v.

CHUGACH ELECTRIC ASSOCIATION,
a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners,

v.

CHUGACH ELECTRIC ASSOCIATION, a Corporation,
Respondent.

No. 1359

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF JURISDICTION

Petitioners have requested this court to review, pursuant to 28 U.S.C. §1254(1), the decision of the Ninth Circuit in this case (*Chugach Electric Association v. United States District Court for the District of Alaska, et al.*, 370 F.2d 441 [1966]). That decision disqualified Edgar Paul Boyko, respondent's former general counsel, and his firm from representing petitioners (hereinafter sometimes called "MRAK") in a $6,000,000.00 antitrust suit against respondents (hereinafter sometimes called "CEA").

Petitioners assert a conflict of decision between this decision and those of several other circuit courts of appeal. This assertion is based upon a totally unjustified and inaccurate characterization of the Ninth Circuit's decision.

The authorities which petitioners seek to establish as

being in conflict with the Ninth Circuit's decision are those upon which respondent argued the matter before the Ninth Circuit. The Ninth Circuit's decision shows no disposition to depart from those precedents. To the contrary, the Ninth Circuit's decision is in full harmony: with its own prior decisions; with the decisions of other circuits and federal district courts; with the standards established by the Supreme Court of Alaska, in which state the case will be tried; and with the interpretations of the Canons of Professional Ethics by the American Bar Association.

The Ninth Circuit did not establish a *per se* rule for antitrust cases. It did, however, as it must, consider the nature of the litigation, its issues and their proof, in evaluating the relationship between the present litigation and the access to confidential information Mr. Boyko enjoyed while he was respondent's general counsel. The Ninth Circuit also, of course, recognized that any doubt must be resolved against the attorney whose disqualification is sought.

The parties had presented the issue by affidavits and exhibits.[1] Faced with a record that compelled the conclusion and a trial court decision that had not fully dealt with the issues (but had proceeded on the basis of invalid conclusions from inaccurate "judicial notice"), the Ninth Circuit, by unanimous decision of three justices, found a relationship between Mr. Boyko's former representation of respondent as its general counsel and the present litigation that required Mr. Boyko's disqualification.

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1. Petitioners at no time prior to filing their Petition for a Writ of Certiorari indicated any desire to present any further evidence.

Question to Be Considered

The only matter being raised by the Petition for Writ of Certiorari is the Ninth Circuit's factual evaluation that Mr. Boyko should be disqualified from further appearance in this litigation against his former client.

COUNTERSTATEMENT OF FACTS

The petition for a writ of certiorari involves the disqualification of petitioners' attorney in an antitrust treble damage action under Sections 1, 2 and 3 of the Sherman Act (15 U.S.C. §§ 1, 2 and 3). The plaintiffs-petitioners, the Trustee in Bankruptcy for MRAK Coal Company and two individual stockholders, are seeking to recover in excess of $6,000,000.00 from respondent and two other defendants. The original complaint was served on April 8, 1965, and after the first argument on the motion to disqualify Mr. Boyko, petitioners filed an amended complaint (R., Vol. 2, pp. 4-32; Vol. 3, pp. 192-205).

1. The General Nature of Mr. Boyko's Former Relationship With Respondent

The attorney for the petitioners, Mr. Edgar Paul Boyko, was formerly corporation counsel for respondent from 1954 through 1957. Throughout this period Mr. Boyko actively represented respondent as its general legal counsel (R., Vol. 3, pp. 111-125, 132-134).

Throughout this representation of respondent (sometimes hereinafter referred to as "CEA"), it is undisputed that Mr. Boyko:

> ". . . was ultimately responsible for the representation of CEA in all of its many and varied legal problems and in advising CEA on all aspects of its

> business. Throughout that period, Mr. Boyko was present at Board of Directors meetings and took an active part in the many discussions held at those meetings. In carrying out his duties with CEA, Mr. Boyko familiarized himself with the complete operation of all CEA facilities, the administrative workings of the corporation, and the relationships and transactions between CEA and its suppliers, customers and other parties with which it has business dealings. This included full familiarization with the relations between CEA and MEA, the relations between CEA and Evan Jones Coal Company, and the relations between CEA and the plaintiff Mrak Coal Company, including the contracting for and commencement of coal purchases from MRAK in *1956* . . .
>
> "In addition, throughout this period, Mr. Boyko had full and complete access to the books, records, personnel, meetings and confidentialities of the corporation." (R., Vol. 3, pp. 114-115)

This was admitted by Mr. Boyko (R., Vol. 3, p. 173), and he stated to the trial court:

> ". . . I knew as much concerning Chugach Electric's business as any lawyer will ever know about the business of a corporate client. There is no question about it, . . ." (R., Vol. 4, p. 47)

Mr. Boyko's resignation was accepted by respondent on April 6, 1957, although his retainer fee continued to be paid through June 30, 1957, and he retained respondent's files (R., Vol. 3, p. 223). Mr. Boyko acknowledged retention of respondent's files, but asserted that he returned some of them at an unstated time after his resignation (R., Vol. 3, p. 258).

According to Mr. Boyko's sworn statement, he even performed legal services for CEA (respondent) after April 7, 1957 (asserted to be non-compensatory — except, of course, for the retainer fees for April, May and June—but

nonetheless an attorney-client relationship) (R., Vol. 3, p. 258).

2. The Allegations of the Complaints and Mr. Boyko's Relation Thereto

With this background in mind, we must now turn to the various allegations of the complaints and the affidavit statements of Mr. Mackle and Mr. Boyko relating thereto.

A. *Motivation and Object of the Alleged Conspiracy*

The original complaint alleged that the motivation for the alleged conspiracy scheme was to "insure that CEA would *maintain* [emphasis supplied] its position as the sole seller of retail electric power owning its own power generating facilities," which allegedly gave CEA monopoly power in South Central Alaska (Complaint, par. 13; R., Vol. 2, p. 12). Inasmuch as the complaint alleged that the conspiracy commenced "in or about 1957" for the purpose of protecting pre-existing monopoly power—it places the existence of this alleged monopoly power of CEA back prior to 1957, when Mr. Boyko was CEA's corporate counsel (R., Vol. 3, pp. 111-125, 132-134).

The Amended Complaint alters the allegations of the original paragraph 13 in the following respects: (a) it alleges that the scheme to protect the pre-existing monopoly power arose "in or after July, 1957"; and (b) adds a reference to maintaining the competitive position it enjoyed after the construction of its Cooper Lake Hydroelectric facility (Amended Complaint, para. II; R., Vol. 3, pp. 193-194).

The prime object of the alleged conspiracy was alleged to be the elimination of the "long standing plans of MEA

to construct its own power generating facility in the heart of the coal producing region in the Matanuska Valley; the so-called 'mine-mouth project'" (Complaint, par. 15; R., Vol. 2, p. 13). The Amended Complaint made no substantial alteration in these allegations, but merely: (a) changed "long standing plans" to "proposed plans"; and (b) added an assertion that the mine-mouth project "appeared close to fruition during the years 1962-64."[2]

Mr. Boyko admits that he fully familiarized himself with the relationship between CEA and MEA (R., Vol. 3, pp. 115, 174; R., Vol. 3, p. 252).

> ". . . There is no question but that MEA had long standing plans for a mine-mouth power plant and it is quite possible that such plans existed in whole or in part during the time that Mr. Boyko was counsel for CEA. . . ." (R., Vol. 3., p. 251)

The Supplemental Affidavit of Terrence G. Mackle also established that:

> ". . . Mr. Boyko had full access to and obtained confidential information with respect to the relationship between CEA and MEA, including various attempts to reach acceptable cooperative arrangements for the construction of future power generating facilities and the impact, if any, upon CEA of any MEA proposal to construct its own power generating facilities." (R., Vol. 3, pp. 222-223)

At first glance, Mr. Boyko's Supplemental Affidavit (R., Vol. 3., pp. 261-262), appears to deny Mr. Mackle's statement. In fact, however, it quickly appears upon careful

2. The reference to "close to fruition in 1962-64" is strictly a red herring which does not alter the substance of the allegations or the prior long standing nature of these plans. This is obvious, when one considers that purpose of the allegation is to set out the object of the alleged conspiracy, as to which both the Complaint and Amended Complaint allege overt acts as early as 1956 and 1957, respectively (R., Vol. 2, pp. 14-16).

reading that Mr. Boyko is only denying *receipt* of confidential information *from MEA* because of an adversity of interests between MEA and CEA while he was CEA's counsel. Mr. Boyko's affidavits do *not* deny that he had access to confidential information of CEA concerning the known proposed plans of MEA to construct a mine-mouth project. The affidavits do not even directly deny actual receipt of such confidential information of CEA. Of course, it is confidential information of CEA (which could take the form of studies, analysis, etc.) concerning the MEA project for which protection is sought—not confidential information of MEA.[3]

B. *Alleged Necessary Factors and Overt Acts of the Alleged Conspiracy*

Paragraphs 19 and 20 of the original Complaint alleged:

> "19. . . . CEA entered into an unlawful combination and conspiracy with the defendants EVAN JONES and PLACER . . . *the substantial terms of which combination and conspiracy were* as follows:
>
> "(a) MRAK, which prior to 1957 had not supplied any coal to CEA, *would be encouraged to enter into a coal supply arrangement with CEA*, and pursuant to this aim, *EVAN JONES*, which had formerly purchased coal from MRAK, *would cease making such purchases*.
>
> "20. For the purpose of carrying out the aforesaid unlawful combination and conspiracy . . . they *con-*

3. The briefs and affidavits on behalf of Mr. Boyko adopted a familiar tactic: if you can't deny what has been said, deny something else that sounds similar and argue as though they were the same. Thus, while the affidavits of Mr. Mackie directly allege that Mr. Boyko had access to confidential internal information of respondent concerning the relationships between respondent and MEA and MRAK and the impacts of their activities upon respondent, Mr. Boyko never denies this. Mr. Boyko's affidavits and the briefs on his behalf instead devote themselves entirely to denying receipt of such confidential information as MEA and MRAK may have had. This tactic will be noted again in regard to other allegations.

spired to do, and *pursuant thereto* have undertaken the following, among other, *overt acts*:

"(a) *Prior to 1957,* EVAN JONES discontinued making purchases of coal from MRAK . . .

"(b) Beginning in 1957 [sic], *CEA commenced purchasing coal from MRAK. . . .*" (Emphasis supplied) (R., Vol. 2, pp. 14-15)

The inception of the alleged conspiracy must obviously predate the commitment of overt acts "pursuant thereto." The Complaint therefore established the inception of the alleged conspiracy as prior to 1957 (since EVAN JONES discontinued purchases pursuant to the conspiracy) and prior to CEA's announcement of purchases from MRAK.

The affidavit of Mackle establishes that Mr. Boyko was retained as counsel for CEA in 1954 through a substantial part of 1957, and that CEA commenced purchasing coal from MRAK in 1956, while Mr. Boyko was CEA's corporate counsel, and that the first coal contract with MRAK had been prepared under the auspices of Mr. Boyko (R., Vol. 3, pp. 115, 136-140). Mr. Boyko's affidavit did not deny these statements by Mr. Mackle but admitted they were "substantially true" (R., Vol. 3, p. 173).

One assumes that competent counsel normally prepares a $6,000,000.00 antitrust complaint with great care and deliberation.

After these matters were brought to Mr. Boyko's attention by a motion to disqualify him, he immediately amended paragraphs 19 and 20 of the Complaint to read:

"19. . . . CEA entered into an unlawful combination or conspiracy . . . the substantial terms of which combination and conspiracy were as follows:

"(a) MRAK, which had been supplying coal to

CEA for a short time, would be encouraged to enter into a series of coal supply arrangements with CEA, *in the fall of 1957*. . . ."

• • •

"20. For the purpose of carrying out the aforesaid unlawful combination and conspiracy . . . they conspired to do, and pursuant thereto have undertaken the following, among other, overt acts:

"(a) *Commencing in the fall of 1957* and taking advantage of the fact that EVAN JONES had discontinued making purchases of coal from MRAK, thereby forcing MRAK to look for other markets, CEA entered into two successive contracts, covering the period from the fall of 1957 to the fall of 1962, at prices so favorable to MRAK, that MRAK had become substantially dependent upon making sales to CEA. . . ." (Amended Complaint, paragraphs IV and V, emphasis supplied; R., Vol. 3, pp. 195-197).

Mr. Mackle's Supplemental Affidavit, paragraph 3(g), states that:

". . . Mr. Boyko had full access to and obtained confidential information relating to the following: (1) the first coal supply contract entered into between MRAK and CEA on August 28, 1956 . . .; (2) the contractual relationships between CEA and MRAK; and (3) the matters preceding and leading to consummation of the second coal contract between MRAK and CEA dated September 1, 1957." (R., Vol. 3, pp. 224-225)

Mr. Boyko's Supplemental Affidavit, paragraph 8(g), in response merely denies: recollection of having anything to do with the first coal contract; and denies receipt or access to confidential information after his termination as CEA's corporate counsel (R., Vol. 3, p. 263). This affidavit does *not* in any way deny:

(1) Having access to and receipt of confidential information while CEA's attorney relating to the then exist-

ing and contemplated contractual relationship between CEA and MRAK; and

(2) Having access to and receipt of confidential information while CEA's attorney relating to the matters preceding and leading to consummation in the fall of 1957 of the second coal contract between MRAK and CEA — the consummation of which is alleged in the Amended Complaint (paragraph 20(a)) to be a specific overt act pursuant to an alleged pre-existing conspiracy.

In regard to amended paragraph 20(a), Mr. Mackle's Supplemental Affidavit states:

> ". . . that Mr. Boyko had full access to and obtained confidential information with respect to the fact that MRAK was, as early as 1956, looking for other markets and did, in fact, enter into a one-year coal supply contract with CEA on August 28, 1956 . . ." (R., Vol. 3, p. 225)

Mr. Boyko at first glance might appear to deny this statement, but in fact evades any direct confrontation and apparently, upon careful reading, is merely denying receipt from and access to confidential information *of MRAK* because he was not then in a confidential relationship with MRAK (R., Vol. 3, p. 264).[4]

C. *Dependency of Evan Jones on Coal Purchase by CEA*

An integral part of the alleged unlawful scheme of CEA, was the subsequent elimination of Evan Jones. In

4. Mr. Boyko also, for the first time, denies the 1956 coal contract between CEA and MRAK was prepared under his auspices and general direction. Previously Mr. Boyko had admitted it to be "substantially true" and denied any recollection of the matters. Mr. Boyko's subsequent denial is inconsistent with his admitted responsibilities and action as CEA's counsel.

this regard, paragraph 16 of the Complaint (even as amended) states:

> ". . . EVAN JONES, although financially stronger (than MRAK), operated extensive coal producing facilities and was dependent upon the continued existence of demand for coal from two major customers, CEA and the Department of Defense, each of which used coal to generate electric power." (R., Vol. 2, p. 13)

Mr. Mackle's Supplemental Affidavit states that:

> ". . . Mr. Boyko had full access to and obtained confidential information relating to the dependency of Evan Jones, if any, upon coal purchases from CEA, which coal purchases terminated in 1956 while Mr. Boyko was employed as CEA's attorney." (R., Vol. 3, p. 224)

Mr. Boyko's Supplemental Affidavit does *not* in any way deny having access to and obtaining such confidential information. Mr. Boyko only denies any connection with the alleged conspiracy or alleged overt acts during and after 1960. (R., Vol. 3, p. 263)[5]

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5. It must be remembered that even the Amended Complaint places the first specifically alleged overt act in the fall of 1957 and therefore dates the inception of the alleged conspiracy prior to that time.

The Petition for Writ of Certiorari asserts without reference to the pleadings (as did the briefs below) that the original and amended complaints allege causes of actions based solely on contracts entered into "in 1960" (Petition, p. 19). As this Counter-Statement of Facts clearly demonstrates, this assertion is totally at odds with the pleadings themselves. We believe this is further emphasized by the fact that the affirmative allegations of both the original and amended complaints undisputably show that there was no contract between MRAK and respondent executed *in 1960* (R., Vol. 2, pp. 4-32; Vol. 3, pp. 192-205). Indeed, neither complaint ever mentioned any date in 1960 or contains any implied reference to any acts allegedly taking place in 1960. This date, around which the argument for Mr. Boyko is made, is purely a creation of Mr. Boyko's advocacy. There are, however, numerous specific and implied allegations in these complaints [as distinct from Mr. Boyko's assertions] that date back to the period of Mr. Boyko's representation of respondent.

Paragraph 28, by realleging paragraphs 20(a) and (b), alleged the exercise of monopoly power and deliberate exclusionary acts prior to 1957 (R., Vol. 2, p. 23-24). Thus the original complaint clearly alleged the existence and unlawful use of monopoly power by CEA while Mr. Boyko was CEA's corporate counsel.

When the above matters were pointed out, Mr. Boyko amended paragraph 26 to read:

> "26. CEA presently possesses and has possessed for a number of years, commencing with the construction of its own hydro-electric power generation at Cooper Lake, and the abandonment of plans for sharing its generating resources with other distributors by means of a generation and transmission cooperative [referred to as occurring in 1958] . . . monopoly power. . . ." (R., Vol. 3, p. 201-202)

The Cooper Lake Project and the disintegration of the generating and transmission cooperative (Central Alaska Power Association, hereinafter referred to as "CAPA") are not only alleged to be crucial points in the inception of the alleged monopoly power of CEA, but are also alleged as the crucial aspects of the alleged dominant position of CEA with respect to which Mr. Boyko asserts that CEA *by* 1957, devised a scheme and plan to continue (R., Vol. 3, p. 193).

Yet, as is clearly established by the Supplemental Affidavit of Terrence G. Mackle, the plans for the construction of the Cooper Lake facilities, the impact of the Cooper Lake Project, and the operation and disintegration of CAPA were all matters which arose while CEA was under the guidance of Mr. Boyko as their general counsel. Said affidavit states:

". . . Mr. Boyko had full access to and obtained confidential information with respect to: (1) the acquisition of CEA of a preliminary permit from the Federal Power Commission for the construction of the proposed Cooper Lake Project; (2) the plans and financing for the proposed Cooper Lake Project; (3) the formation and operation of the proposed generation and transmission co-operative (Central Alaska Power Association, hereinafter referred to as CAPA); (4) all matters leading to the withdrawal of MEA from CAPA by resolution of MEA dated November 5, 1956, a copy of which is attached hereto as Exhibit "A" and by this reference incorporated herein; (5) matters relating to CEA's dissatisfaction with CAPA; and (6) the history, policy and reasons leading to CEA's ultimate withdrawal from CAPA. This affiant further states that ultimately CEA formally withdrew from CAPA by motion dated May 8, 1957, a copy of which is attached hereto as Exhibit "B", and by this reference incorporated herein, at a time when Mr. Boyko was still receiving salary as CEA's attorney and at a time when Mr. Boyko was retaining CEA's files in his possession pending the payment of his fees through July 1, 1957. . . ." (R., Vol. 3, pp. 223-224)

Since the complaint alleges that the basic party against which the alleged conspiracy and monopolization was aimed was MEA, MEA's conduct while in CAPA, its voluntary withdrawal in 1956, and its relationship with CEA during this period will obviously become involved in this litigation in a major way. It is undisputable that Mr. Boyko had access to CEA's files and confidentialities in regard to these matters.

Mr. Boyko has admitted great familiarity with all of the matters mentioned by Mr. Mackle as a result of his relationship with CEA as its counsel (R., Vol. 3, p. 252).

Mr. Boyko, in his Supplemental Affidavit (R., Vol. 3,

p. 262) does *not*, in any way, deny access to, and having obtained, confidential information relating to items (1) through (4) of paragraph 3(e) of Mr. Mackle's Supplemental Affidavit—he merely states that he does feel such information has no bearing on the issues (compare with his admission, quoted in subsection E, below, pp. 14-15, that the matters to which such confidential information relates with be *material and are of importance* in establishing unlawful overt acts).

Mr. Boyko does *not* directly mention or deny the statement that he had access to and obtained confidential information relating to the history, policy and reasons leading to CEA's ultimate withdrawal from CAPA (R., Vol. 3, p. 262).

Mr. Boyko also amended paragraph 28 of the Complaint so that it now alleges, by realleging amended paragraph 20(a), that the consummation of the contract with MRAK in 1957 was an unlawful exercise of monopoly power and a deliberate exclusionary act—thus placing the inception of the alleged monopoly power prior to the fall of 1957, while Mr. Boyko was attorney for CEA (R., Vol. 3, p. 202).

D. Boyko's Admission That Matters Arising While He Was Counsel for Respondent Are Material and Important to the Litigation

Mr. Boyko, in a brief to the trial court, admitted that:

> "The economic posture and status of CEA during the time Mr. Boyko was its attorney (i.e., prior to April 6, 1957), including factors such as its corporate structure, resources, generation and transmission facilities, relative position in the Alaska power in-

dustry, the proposed Cooper Lake project and the formation of CAPA, etc., were all matters of common knowledge. . . . *Such factors will become material to this lawsuit.* . . . Although preliminary matters, *they are of importance to establish the basis for proof of overt* unlawful acts. . . .' (R., Vol. 3, p. 244) (Emphasis supplied)

ARGUMENT

1. The Lower Court's Action

The trial court's opinion concluded it had not been shown that Mr. Boyko had received or had access to confidential information relating to the issues in the present case (R., Vol. 3, p. 276). It is clear from the opinion and from the trial court's subsequent "Reply to Petition for Writ of Mandamus," that the trial court reached this conclusion not from an analysis of the facts before it, but on the basis of "judicial notice" of certain "facts" and deductions therefrom (R., Vol. 3, p. 273-276; R., Vol. 1, Reply to Petition for Writ of Mandamus, p. 4). Respondent, before the Court of Appeals, challenged the propriety and accuracy of this "judicial notice," and the invalid conclusion the trial court reached on this basis.

The trial court in its opinion purported to take "judicial notice" of the following:

(a) Respondent and the City of Anchorage had certain disputes and litigation relating to areas of service, which were well publicized;

(b) That a cleavage developed on Respondent's Board of Directors and that both sides were publicly vocal in criticizing the other group and in advocating their position;

(c) That the disputes among respondent's directors produced many public statements and discussions resulting in a general interest in the election of directors;

(d) Respondent's affairs became newsworthy; and

(e) Respondent's affairs were publicly discussed and debated (Trial Court Opinion, R., Vol. 3, pp. 273-276). From the above, the trial court concluded that it was impossible for Mr. Boyko to have had access to any confidential information (R., Vol. 1, Reply to Petition for Writ of Mandamus, p. 4).

We disputed that the full scope of this "judicial notice," particularly as expanded by statements in the trial court's reply, is proper or consistent with the true facts. Additionally, however, we would like to point out that the matters of "judicial notice" in the Trial Court's Opinion also do not support its conclusion. This is perhaps best demonstrated by applying similar judicial notice to a different set of facts. We would like this court to take judicial notice of the following:

(a) Congress and the executive branch of the federal government have had a series of continuing disputes concerning the conduct of the war in Viet-Nam, which disputes have been widely publicized by all forms of mass media;

(b) A cleavage has developed in Congress between pro-administration and anti-administration factions, and both sides have been publicly vocal in cirticizing the other group and advocating their own position;

(c) These disputes have produced many public state-

ments and discussions, resulting in a general interest in the election of Congressmen;

(d) Congress' affairs have become newsworthy; and

(e) Congress' affairs have been publicly discussed and debated.

Now, would this court conclude, from the above, that a high-ranking, confidential Congressional employee (who had access to all Congressional records and Congressional personnel) could not possibly have had access to any confidential information? We do not think such a conclusion would be reached—yet, this is precisely what the lower court's opinion did and what the Court of Appeals rejected.

The statement by Mr. Moran, which the trial court refers to in its reply (R., Vol. 1, Reply to Petition for Writ of Mandamus, pp. 3-4) was made in the context of a reference to the public's widespread knowledge of Mr. Boyko's former association with Petitioner—as a result of numerous instances of widely publicized litigation (R., Vol. 4, pp. 38-39). It is a wide step from that to purporting to take judicial notice that it was impossible for Petitioner to have any confidences throughout the entire period of Mr. Boyko's representation. To conclude, because of the existence of some litigation with others and some disputes among Petitioner's directors as to certain policies and actions, that therefore every record, every study and every action and statement of all employees and directors—regardless of whether or not related to a matter then in dispute among directors—automatically became a matter of common public knowledge, is unjustified and contrary to actual fact.

The lower court, for the first time, in its reply (R., Vol. 1, Reply to Petition for Writ of Mandamus, pp. 6-7), explains that where a conflict between the affidavits of Mr. Mackle and Mr. Boyko existed, he credited Mr. Boyko. This, of course, does not explain how the trial court overcame those portions of Mr. Mackle's affidavits admitted by Mr. Boyko; those portions of Mr. Mackle's affidavits not denied by Mr. Boyko; conflicts between Mr. Boyko's affidavits and the pleadings; and conflicting statements made by Mr. Boyko himself.

The resolution of conflicting statements apparently was again based on erroneous "judicial notice" of the motives of Mr. Mackle and the reason he signed the affidavits instead of two other individuals.

Mr. Mackle signed the affidavits because he was the *one* person who had been on the Board of Directors continuously from 1955 to date. While he had disagreed with Mr. Boyko on certain policies and actions, he had never had any personal difficulties with Mr. Boyko (as did some of the other directors), he had not been up for re-election in 1957, and did not make the statement attributed to him by the court that he considered the election a "mandate to fire Boyko."

The lower court indicated that if Respondent's affidavits were to be believed, they should have been signed by Richard B. Smith (R., Vol. 1, Reply to Petition for Writ of Mandamus, p. 7). Such "judicial notice" was erroneous. Mr. Smith obviously had insufficient knowledge to have signed the affidavits. Mr. Smith was first elected to the Respondent's Board of Directors on April 5, 1957, first participated as a director on April 8, 1957, and his

first action as a director was to vote in favor of accepting Mr. Boyko's resignation.

As for Mr. Stewart, although he was Respondent's manager for a period of time up to 1957, he did not become a director until 1961 and had no association with Petitioner for many years. Counsel for Respondent selected Mr. Mackle instead of Mr. Stewart for the valid and logical reason that Mr. Mackle had a complete continuity of association with Respondent, as a director, from 1955 to date.

The trial court, of course, had been presented with a difficult task because of the nature of Mr. Boyko's advocacy. There are many instances in the briefs and affidavits on behalf of Mr. Boyko where broad undocumented and unsupportable assertions were made; or where the complaints were inaccurately characterized; or where broad assertions from Mr. Boyko's affidavits were relied upon as though they superseded conflicting allegations of the complaints filed. This type of affidavit and argument is apparently the hallmark of Mr. Boyko's advocacy. *Gregoire v. National Bank of Alaska*, 413 P.2d 27 (Alaska Sup. Ct. April 7, 1966). Such advocacy and the manner in which the trial court had reached its decision, unfortunately, also cast a heavy burden upon the Court of Appeals to examine and analyze the pleadings and affidavits in detail. Inasmuch as the parties had elected to present the issue on affidavits and exhibits, the Court of Appeals was in as good a position to review the facts as had the trial court.

2. The Decision of the Court of Appeals for the Ninth Circuit

The disqualification of an attorney from appearing in

litigation adverse to a former client, is an issue which by its nature is best determined at the earliest possible time in the course of litigation so as to protect the interests of all parties—including those of the party whose attorney is being disqualified. *Cord v. Smith*, 338 F.2d 516 (9th Cir., 1964); *Gregoire v. National Bank of Alaska*, 413 P.2d 27 (Alaska, 1966). Mr. Boyko, himself recognized that a prompt determination of the issue would serve the best interests of his clients (R., Vol. 4, pp. 77-78). Indeed, Mr. Boyko's unsuccessful attempt in *Gregoire v. National Bank of Alaska*, 413 P.2d 27 at 36-37 (Alaska 1966) to use a delayed disqualification of his client's former attorney as a basis for reversing a trial court decision on the merits, underscored the need to determine Mr. Boyko's disqualification at this early state in the litigation.

In reaching its decision, the Court of Appeals examined: (1) the nature of the present litigation and the issues expressly and potentially involved, (2) the nature of Mr. Boyko's prior representation of the respondent; and the relationship between confidential information Mr. Boyko would have had access to during his representation of Respondent and the areas of issue and proof present in the existing litigation. 370 F.2d at 442-443. The Court of Appeals also recognized (1) that Respondents were not required to reveal specific confidential information in order to establish an actual conflict and (2) that in cases of doubt the attorney must be disqualified. 370 F.2d at 444. In so doing, it concluded that the record before it required Mr. Boyko's disqualification.

The decision of the Court of Appeals was fully consistent with: the canons of professional ethics and opinion

of the American Bar Association; prior federal court decisions; and the standards of professional ethics adopted by the Supreme Court of the State of Alaska (in which state this litigation arose and will be tried).

A. The Canons Involved

It is clear under these circumstances that Mr. Boyko's representation of the plaintiff in this case against CEA is in violation of Canons 6 and 37 of the Canons of Professional Ethics of the American Bar Association, which were adopted by the Supreme Court of Alaska in 1963, and which are applied by the federal courts Mr. Boyko must be disqualified from any further participation, direct or indirect, in this case, so long as CEA remains a party defendant.

Canons 6 and 37 state:

> "6. *Adverse Influences and Conflicting Interests.*
>
> "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."
>
> "37. *Confidences of a Client.*
>
> "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employ-

ment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client."

The federal courts have repeatedly held that these canons prohibit conduct such as that involved in Mr. Boyko's representation of this plaintiff and require the disqualification of the attorney (and of the attorney's firm).

The Committee on Professional Ethics and Grievances of the American Bar Association has issued the following interpretation of these canons:

> "An attorney should not accept litigation against a former client, under any circumstances if it would result in conflict of interests or disclosure of confidences of the former client, and in such a situation a court is justified in enjoinging a lawyer from proceding with the litigation against the former client. Moreover, the attorney should avoid representation of a party in a suit against a former client when there may be the appearance of a conflict of interest or a possible violation of confidence, even though this may not in fact exist." Informal Opinion No. 885, Vol. 52 A.B.A.J. p. 428 (1966)

> "While an attorney may accept a case in which there is the possibility of liability ultimately falling on a past client, all parties must be completely satisfied with the representation and consent thereto after complete disclosure by the attorney of 'all circumstances of his relations to the parties and any interest in or connection with the controversy.' (Canon 6)." Informal Opinion No. 891, 52 A.B.A.J. p. 634 (1966) See also: Opinion No. 134, A.B.A.

B. The Ninth Circuit Decision in This Case Is Consistent With Other Federal Decisions

The Ninth Circuit had previously stated in disqualifying an attorney in *Cord v. Smith*, 338 F.2d 516 (1964):

". . . We think that the famous words of Judge Cardozo in *Meinhard v. Salmon*, 1928, 249 N.Y. 458, 464, 164 N.E. 545, 546, 62 A.L.R. 1, in which he was defining the duties of a trustee, are equally applicable to an attorney-at-law in relation to his conduct in the federal courts: 'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the disintegrating erosion of particular exceptions. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.'" 338 F.2d at 524-525

Similarly, in *United States v. Trafficante*, 328 F.2d 117 (5th Cir. 1964) it was stated by the Fifth Circuit:

". . . It is not necessary, in order that disqualification result from a prior employment, that it be shown that the attorney acquired knowledge while representing the prior client which would operate to his disadvantage in the subsequent adverse representation. 5 Am. Jur. 297-298, Attorney at Law § 66.

"The Preamble to the Canons of Ethics admonishes the members of the bar that their conduct should be such as to merit the approval of all good men. That conduct should not be weighed with hair splitting nicety. We have found no exceptions to the exhortation to 'abstain from all appearance of evil.' 1 Thessalonians 5:22." 328 F.2d 120. (Emphasis supplied)

In *T.C. & Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D. N.Y. 1953) the court stated:

* * *

". . . Lawyers should not put themselves in the

position 'where, even unconsciously, they might take, in the interests of a new client, an advantage derived or traceable to, confidences reposed under the cloak of a prior, privileged relationship.' In cases of this sort the court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation. If so then the relationship between the two matters is sufficiently close to bring the later representation within the prohibition of Canon 6. In the instant case I think this can be said." (113 F. Supp. at 269)

The *T.C. & Theatre Corp.*, case was expressly cited with approval and quoted by the Second Circuit in *Consolidated Theatre v. Warner Bros. Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954) where the court approved the disqualification of the plaintiff's attorney because as a result of his work for defendants on other litigation, he had *access* to the files of the defendant for a period relevant to the present litigation, even though there was no evidence of his obtaining specific confidential information. The court stated at page 927:

". . . Canon 6 is devised to protect the secrets and confidences reposed in the attorney by his clients. It is the work done for the client and the access to the confidential information of the client which is crucial in determining whether the obligation of Canon 6 arises. Regardless of whether Mr. Nickerson, concededly an attorney at law, was a law clerk or not, in the Schine and Griffith cases, which involved matters substantially similar to the instant case, he had access to the files of Fox and of the 'group' and he performed other services for the group—all defendants in the instant case—which might well have brought him into contact with confidential in-

formation. That was enough, we hold, to give rise to the obligation of Canon 6."

In *United States v. Standard Oil Company*, 136 F. Supp. 345 (S.C., N.Y. 1955), the court stated:

"Insofar as these canons relate to the question of the preservation of a former client's confidences, they disqualify an attorney who has received *confidences which might possibly be relevant to the controversy* at hand, as they seek to avoid unconscious as well as conscious betrayal.

"As to who must carry the burden of showing that relevant confidences were reposed, *an inference favorable to complainant has been reaffirmed recently in this Circuit. . . .*" 136 F. Supp. 353-354, (Emphasis supplied)

In *Harmar Drive-In Theatres, Inc. v. Warner Bros. Pictures*, 239 F.2d 555 (2d Cir., 1956), the Second Circuit adhered to these standards and disqualified an attorney on the basis of his former association with another law firm which had represented the defendant (although the attorney had not himself participated in the former representation).

See also: *Fisher Studio Inc. v. Loew's Incorporated*, 232 F.2d 199 (2d Cir., 1956), *cert. den.* 352 U.S. 836, 1 L.Ed.2d 55; *W. E. Bassett Company v. H. C. Cook Company*, 201 F. Supp. 821 (D. Conn. 1962), affirmed *per curiam*, 302 F.2d 268 (2d Cir. 1962); *Marco v. Dulles*, 169 F. Supp. 622 (S.D. N.Y. 1959). Compare also those cases which have adhered to these standards but upon a searching analysis of a very limited former representation have made a factual determination that no basis for disqualification existed: *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257 (9th Cir., 1964), *cert. den.* 380

U.S. 956 (1965); *Gajewski v. United States*, 321 F.2d 261 (8th Cir. 1963), issue raised for the first time by supplemental brief on appeal; *Shelley v. The Maccabees*, 184 F. Supp. 797 (E.D. N.Y. 1960)

C. The Ninth Circuit Decision Is Consistent With the Standards Established By the Alaska Supreme Court

In the recent decision of *Gregoire v. National Bank of Alaska*, 413 P.2d 27 (Alaska 1966), the Alaska Supreme Court dealt with the question of disqualifying an attorney at the request of his former client. Although Mr. Boyko participated in that case, it was his predecessor as counsel (Mr. Walton) that had been disqualified. That case involved the foreclosure of a mortgage, resisted on the allegation that the bank and its officers had conspired against the defendant and converted assets belonging to him. The bank filed a motion to disqualify Mr. Walton on the basis that he had prepared the mortgage for the bank. Mr. Walton denied that he had done so and alleged that he had prepared the mortgage as attorney for the defendant. The bank admitted it knew of no confidential information being received by Mr. Walton. The lower court indicated to Mr. Walton that it would disqualify him inasmuch as his continued participation would clearly lead the public to believe that a conflict of interests had been permitted. The Alaska Supreme Court affirmed the lower court, stating:

> ". . . Since it was not then known what testimony would be produced by appellants at a trial to substantiate their allegations, it could not be determined whether a conflict of interest might not develop during the trial which would require Mr. Walton to withdraw, if he was not in fact already disqualified.

> In addition, there was the question of propriety and the public image of the legal profession, as the judge pointed out.
>
> • • •
>
> "Instead of amounting to an abuse of discretion, we consider the trial judge's comments with respect to Mr. Walton's situation to be entirely appropriate. . . ." 413 P.2d at 39, 40.

In the course of approving the lower court's decision, the court quoted from *Wilson v. Wahl*, 182 Kan. 532, 322 P.2d 804 (1958), including the following statement:

> ". . . An attorney should avoid not only situations where a conflict of interest is actually indicated, but also those in which a conflict is likely to develop." 413 P.2d at 39.

Respondent feels that it was abundantly established that Mr. Boyko had access to confidential information relating to matters which will be material to this lawsuit and, therefore, it is adequately shown that "a conflict of interests is actually indicated." Certainly it is obvious that a conflict is "likely to develop" at the trial (or before) and that the court is faced with a situation where the public would be convinced that the court had permitted a conflict of interests to exist and continue. The federal courts should at least impose as broad a test for conflicts of interest as that imposed in the state in which the trial will take place. Actually, however, as we have shown, the federal courts have always been as strict or stricter in governing the conduct of the attorneys before them.

CONCLUSION

The only issues in this litigation are ones of factual evaluation. The record in this matter virtually compels

the conclusions reached by the Ninth Circuit. That court reached its determination in accordance with established principles and in harmony with prior federal court decisions and with the standards established by the Supreme Court of the state in which the case will be tried.

As the court recognized in *Cord v. Smith*, 338 F.2d 516 (9th Cir. 1964), there are no practical reasons justifying a court in straining to find a reason not to disqualify an attorney from a particular litigation if any reasonable question is raised as to the propriety of his doing so. The plaintiffs will not be prejudiced by Mr. Boyko's disqualification, as there are many competent attorneys available to them.

For these reasons, the Respondent respectfully submits that this Honorable Court should promptly deny the Petition for a Writ of Certiorari.

Dated June 2, 1967.

Respectfully submitted,

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